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(1)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR
CHHATTISGARH

Cr.A. No.658/2003

APPELLANT
(IN JAIL)

: Govind Ram, S/o. Dharamsai
Aged 35 years, R/o. Bramhapara
P.S. Ambikapur District
Sarguja (C.G.)

2132/03

Filed on 16/6/03
by Shri Tiwari Advocate

VERSUS

RESPONDENT

: The State of Chhattisgarh
Through P.S. Ambikapur
District Sarguja (C.G.)

CRIMINAL APPEAL U/S. 374 (2) OF CODE OF CRIMINAL PROCEDURE

(39)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 658/2003

Govind Ram

Versus

State of Chhattisgarh -

Post for judgment : 20.01.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(38)

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.658/2003

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Govind Ram

Versus

State of Chhattisgarh

Smt.Savita Tiwari, Counsel for the appellant.

Shri Ravindra Agrawal, P.L. for the State.

JUDGMENT

(Delivered on 20th January 2006)

This appeal is directed against the judgment dated 3.5.2003 delivered by Shri Raghubir Singh, Special Judge, N.D.P.S.Act, Ambikapur, Surguja in special criminal case No.16/2002 whereby the appellant was convicted under Section 22 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the Act') and was sentenced to R.I. for ten years and a fine of Rs.1,00,000/-, in default to undergo additional R.I. for three years.

2. Briefly stated the prosecution case is that on 19.3.2002 Sub-Inspector Haricharan Singh P.W.8 of Police Station Ambikapur, received secret information that one person was in unauthorized possession of brown-sugar. After complying with the legal formalities, alongwith witnesses Shahid Khan P.W.5 and Anwar Qureshi P.W.1, he reached the spot near the school situated at Gram Asola. After giving notice under Section 50 of the Act, the appellant was searched. From his full pant, brown-sugar like substance was seized in two white coloured polythenes vide Ex.P.5. On weighment, it weighed 10 gms.

and 50 milligrams. The contents of both the packets were mixed. The packets were sealed. One white coloured fossil sheet found in cigarette packets having stains showing that brown-sugar was consumed was also seized. The seized sealed packets of brown sugar were handed over to Head Constable Mahesh Prasad Gupta P.W.2 for safe custody. On 20.03.2002 both the sealed packets were sent along with memo Ex.P.25 of Superintendent of Police, Surguja for chemical analysis to the Forensic Science Laboratory, Raipur. Vide report dated 30th March 2002, both the packets were found to contain diacital morphin (heroin). On completion of investigation, the accused-appellant was prosecuted under Section 22 of the Act. The accused abjured his guilt, pleaded innocence and led no evidence in defence. The learned trial Judge relying upon the evidence led by the prosecution convicted and sentenced the accused-appellant as aforesaid in paragraph 1.

3. Smt. Savita Tiwari, learned counsel for the appellant has assailed the conviction of the appellant on the following grounds:

i) Independent witnesses Anwar Qureshi P.W.1 and Shahid Khan P.W.5 did not support the prosecution story which rendered the testimony of Haricharan Singh, A.S.I. unreliable. Reliance was placed on *Bhola Ram Kushwaha v. State of M.P.* reported in 2001 SCC (Cri) 1 and *Bahadur Singh v. State of Madhya Pradesh and another* 2002 Cri. L.J. 579 (SC)

ii) Chhedi Prasad P.W.6 witness of weighment *Panchanama* also did not support the prosecution story whereby weighment *Panchanama* Ex.P.9 was rendered doubtful.

iii) A.S.I. Haricharan Singh P.W.8, in the notice under Section 50 of the Act Ex.P.1, did not mention that that he had informed the accused-appellant about hi legal right to be searched

before a Gazetted Officer or a Magistrate. Failure to do so, caused serious prejudice to the accused-appellant. Therefore, for non-compliance of the mandatory requirement of Section 50 of the Act, the appellant was entitled to be acquitted. Reliance was placed on *K.Mohanan v. State of Kerala* reported in 2000 SCC (Cri) 1228.

iv) It was lastly contended that there was no evidence to show that the seized substance was received in the *Malkhana* of P.S. Ambikapur after putting the seal of the officer-in-charge of P.S. Ambikapur on it. Thus, there was total non-compliance of Section 55 of the Act and it could not be ruled out that the sample sent for examination by the F.S.L. had been tampered with.

4. Shri Ravindra Agrawal, learned P.L. for the State supported the impugned judgment and submitted that there has been substantial compliance of Section 50 of the Act and Haricharan Singh A.S.I. has in cross-examination para 31 clearly stated that before giving notice under Section 50 of the Act he had informed the accused about his legal right under Section 50 of the Act.

5. I have considered the rival submissions and carefully perused the record. It is true that independent witnesses Anwar Qureshi P.W.1 and Shahid Khan P.W.5 did not support the prosecution story. Chhedi Prasad P.W.6 also stated that the weighment *Panchanama* was not made in presence of the accused and the police had gone to his shop and asked him to weigh some packets. He has also denied that those packets were seized from the accused-appellant. A.S.I. Haricharan Singh P.W.8 admitted in para-31 of his cross-examination that the accused was an illiterate person, and therefore, his thumb impression was affixed on the documents. In his examination-in-chief

para 6, he did not state that he had informed the accused that he had a legal right under the Act to get himself searched before any Magistrate or Gazetted Officer. It is only in cross-examination para-31 that it has emerged that he had explained to the accused about his right regarding being searched under Section 50 of the Act. What was actually said by A.S.I. Haricharan Singh while actually explaining to the accused about his legal right under Section 50 of the Act was not deposed. Moreover, the notice Ex.P.1 does not mention that the accused was informed of his legal right to be searched by the nearest Magistrate or a Gazetted Officer. It only mentions that if the accused wanted, he could be searched by any nearest Magistrate or S.D.O. (P)/C.S.P. Thus, the notice does not mention that the accused could opt for being searched by any Gazetted Officer. Head Constable Sanjay Tiwari P.W.9 who was present with the A.S.I. Haricharan Singh has also not deposed that the accused was apprised by A.S.I. Haricharan Singh about his legal right to be search under Section 50 of the Act. In para-6, he stated that A.S.I. Haricharan Singh had asked the accused whether he would like to be searched by A.S.I. Haricharan Singh or by any Gazetted Officer. Thus, the evidence of this witness does not show that the option of being searched by a nearest Magistrate was given to the accused-appellant. On the one hand, there is a material omission in the notice Ex.P.1 regarding informing the accused-appellant about his legal right under Section 50 of the Act and on the other hand the testimony of A.S.I. Haricharan Singh P.W.8 and Head Constable Sanjay Tiwari P.W.9 is self-contradictory. Independent witnesses Anwar Qureshi P.W.1 and Shahid Khan P.W.5 did not support the prosecution story.

6. Notice Ex.P.1 clearly shows that merely the opinion of the accused was sought as to whether he wanted to be searched by a

nearby Magistrate or S.D.O.(P)/C.S.P. or not. It does not even show that the option of being searched by any Gazetted Officer was given to the accused-appellant. In *K.Mohanan v. State of Kerala* reported in **2000 SCC (Cri) 1228**, it was held that if the accused who was subjected to search was merely asked whether he required to be searched in the presence of a Gazetted Officer or a Magistrate, it cannot be treated as communicating to him that he had a right under the law to be searched so. The Apex Court, therefore, held that there was non-compliance with Section 50 of the Act and consequently, the evidence of Sub-Inspector of Police could not be acted upon in the absence of any other independent witnesses to show that the appellant was in possession of the contraband article. In the aforesaid case, the packet recovered from the folder lioncloth were alleged to contain 4 small packets of brown sugar. The above citation applies to the instant case with full force. Notice Ex.P.1 did not show that the accused-appellant was apprised of his legal right under Section 50 of the Act. It also did not show that the accused-appellant was given option to be searched by any Gazetted Officer. The testimony of A.S.I. Haricharan Singh P.W.8 and Head Constable Sanjay Tiwari P.W.9 is also contradictory as Head Constable Sanjay Tiwari P.W.9 did not state that the accused was apprised of his legal right under Section 50 of the Act or was given the option to be searched by any nearby Magistrate. Thus, there has been total non-compliance of Section 50 of the Act in the instant case.

7. Section 55 of the Act reads as under:

> 55. **Police to take charge of articles seized and delivered.**—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may

be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police Station.

A plain reading of Section 55 shows that before keeping articles seized in the *Malkhana*, the officer-in-charge of the police station is required to put his seal on such packets. However, in this case, there is total non-compliance of Section 55 of the Act. Neither A.S.I. Haricharan Singh P.W.8 in para 21 of his evidence nor Mahesh Prsad Gupta P.W.2 in para 2 stated that the seized article were kept in the *Malkhana* after affixing the seal of the officer-in-charge of the police station. Head Constable Sanjay Tiwari also did not make any such statement. The copy of the *Malkhana* register Ex.P.16 did not even reveal that the polythene packets which were alleged to contain brown-sugar were delivered at the *Malkhana* in a sealed condition. It only says that 4 white polythene packets which were kept in yellow polythene said to contain brown-sugar and one white cigarette foil said to contain stain of smoking brown-sugar was delivered. This renders the testimony of A.S.I. Haricharan Singh P.W.8 and Head Constable Sanjay Tiwari P.W.9 totally unworthy of credit that the seized articles were sealed on the spot. In the above mentioned circumstances, it cannot be ruled out that the brown-sugar which was examined by the F.S.L. had not been seized from the accused-appellant.

8. In view of the facts and circumstances, in my considered opinion due to non-compliance of Section 50 and 55 of the Act, the conviction of the appellant under Section 22 of the Act cannot be sustained.

9. In the result, the appeal is allowed and the appellant is acquitted of the charge under Section 22 of the Act. The accused shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the accused-appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani